UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ROLAND C. BRASWELL,
Defendant-Appellee.

No. 93-5770

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROLAND C. BRASWELL,
Defendant-Appellant.

No. 93-5813

Appeals from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Terrence W. Boyle, District Judge.
(CR-92-101)

Argued: May 13, 1994

Decided: February 8, 1995

Before WIDENER and WILKINS, Circuit Judges, and ELLIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, reversed in part, and remanded by unpublished opinion. Judge Widener wrote the opinion, in which Judge Wilkins and Judge Ellis joined.

COUNSEL

ARGUED: John Samuel Bowler, Assistant United States Attorney, Raleigh, North Carolina, for Appellant. Diedra Lynn Whitted, Goldsboro, North Carolina, for Appellee. **ON BRIEF:** Janice McKenzie Cole, United States Attorney, Raleigh, North Carolina, for Appellant.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

WIDENER, Circuit Judge:

This is a troubling case. We must decide whether a district court should have granted a motion for judgment of acquittal to a defendant who has been the victim of prosecutorial misconduct before the grand jury. We answer that question in the negative in the circumstances of this case.

I

Appellant Roland C. Braswell was a Goldsboro, North Carolina attorney who stood accused of helping his clients conceal the profits from their illegal drug trafficking activity through the use of sham corporations and other devices. Two former clients, Canady and Riggs, each of whom had been convicted of drug trafficking crimes, were the main witnesses against him at trial as to the alleged conspiracy.

The perjury charges stemmed from Braswell's testimony before the same grand jury investigating the same case. In particular, Braswell testified about documents purporting to be the corporate records of the shell corporations he established for Canady and Riggs. Before the grand jury and at trial, the government presented witnesses who testified that the documents had been recently fabricated. These wit-

nesses based their conclusions on analyses of the dates of manufacture of the papers and on analyses of indentations on the papers.

The grand jury indicted Braswell on 16 counts. Count One charged conspiracy to defraud the United States by impeding the collection of tax in violation of 18 U.S.C. § 371; Counts Two through Seven each charged the misdemeanor crime of willful failure to file a tax return for each year between 1986 and 1991 in violation of 26 U.S.C. § 7203; Counts Eight through Fifteen each charged perjury for separate statements made before the grand jury, relating to the preparation of certain documents in violation of 18 U.S.C. § 1623; and Count Sixteen charged the crime of aiding or assisting the filing of a false tax return in violation of 26 U.S.C. § 7206.

On the morning of trial, Braswell pleaded guilty to the six misdemeanor charges (Counts Two through Seven). The trial on the remaining counts then proceeded. At the close of the government's case Braswell made a motion for judgment of acquittal. The district court granted the motion in part and dismissed Counts Nine through Fourteen (6 of the 8 perjury counts) as being duplicative of the same statement. The jury later found Braswell guilty of Counts One, Eight, and Fifteen (the conspiracy and two remaining perjury charges). The jury acquitted Braswell of Count 16 (aiding or assisting a false statement).

After trial, Braswell made another motion for judgment of acquittal on the conspiracy and two perjury convictions (Counts One, Eight and Fifteen) based upon misconduct of the prosecutrix before the grand jury. The district court granted the motion as to the two perjury convictions but denied it as to the conspiracy conviction because it found that there was ample evidence to support the conspiracy conviction. The government appealed the district court's grant of judgment of acquittal on the two perjury convictions,[1] and Braswell has appealed the failure of the district court to dismiss all of the indictment and on other grounds.

[1]The district court granted a motion for acquittal on the perjury counts. No distinction is made in the briefs between that and a motion to dismiss the indictment.

The Grand Jury Proceedings

The grand jury was in session on the morning of August 19, 1992, and a special Agent with the Internal Revenue Service, Terence O'Brien, was called to testify.[2] Agent O'Brien detailed the investigation of the drug traffickers Canady and Riggs and explained how Braswell had come to his attention. Agent O'Brien described several transactions that involved Braswell's efforts to help Canady and Riggs acquire possessions and property without attracting the attention of the IRS, including the purchase of a boat, the purchase of a farm, and an attempted purchase of a hotel. In addition, Braswell helped obtain a false Form 1099 (an income reporting form used for income tax) in an effort to help Riggs conceal even more of his income.

O'Brien then began to describe several meetings he or the United States Attorney's Office had with Braswell, as well as explanations Braswell offered for various incidents and acts. The Assistant United States Attorney guided Agent O'Brien through much of this testimony. Then the Assistant United States Attorney made the following remarks:

> Q: OKAY. DO YOU WANT TO GO NOW TO THE — TO THE SALE OF THE FARM AND THEN WE'LL GO INTO MR. BRASWELL'S EXPLANATIONS FOR ALL OF THIS?
>
> FOREPERSON: EXCUSE ME. DO WE NEED TO TAKE A BREAK?
>
> [THE PROSECUTRIX][3]: LET ME ASK YOU ONE—

[2]The Government gave the grand jury transcript to Braswell at trial after Agent O'Brien testified. Braswell then discovered, for the first time, what had occurred before the grand jury. Braswell was doubtless diligent.

[3]The prosecutrix did not appear on appeal either at argument or on the brief.

FOREPERSON: YEAH.

[THE PROSECUTRIX]: —ONE THING. MR. BRASWELL — WE'VE INVITED HIM TO APPEAR IN FRONT OF THE JURY. SO RIGHT NOW HE MAY BE OUTSIDE WITH HIS ATTORNEY, SO I'D ASK YOU NOT TO MAKE ANY COMMENTS ABOUT ANY OF THIS BECAUSE WE ANTICIPATE THAT MR. BRASWELL MAY PERJURE HIMSELF TODAY IN FRONT OF YOU, AND I WANT HIM TO — US TO HAVE A VERY FRIENDLY ATMOSPHERE IN HERE SO THAT HE FEELS VERY AT EASE IN GIVING HIS EXPLANATIONS FOR THIS TYPE OF THING. AND THEN WE MAY — WE'RE GOING TO HAVE ANOTHER WITNESS COME IN LATER WITH SOME OTHER INFORMATION. IS THERE ANYTHING YOU WANT TO SAY ABOUT THAT — SO I'D ASK YOU TO PLEASE NOT SAY A WORD, BECAUSE I ANTICIPATE THAT THEY'D BE OUT THERE RIGHT NOW.

Shortly after the grand jury proceedings resumed, Braswell testified about documents he had voluntarily turned over to the United States Attorney's office. Several of the documents were corporate record and minute books from the shell corporations set up for Canady and Riggs. Braswell's testimony indicated that he had made entries into these books on or about the dates written on the pages (*i.e.*, the years 1985 to 1988).

Following Braswell's testimony, a document examiner testified before the grand jury. The document examiner had tested the paper used in the documents turned over by Braswell and concluded that the paper dated from 1991. His indentation analysis also disclosed dates other than that shown on the face of the papers. When the grand jury returned the indictment four weeks later, on September 14, 1992, it included eight perjury charges resulting from Braswell's testimony before the grand jury.

II

Braswell raises several challenges to his conviction of conspiracy: (1) the prosecutor's conduct before the grand jury required the dismissal of the two perjury counts and the conspiracy count[4]; (2) the prosecutor and the district court erred in referring to the crime with which Braswell was charged as money laundering rather than conspiracy to defraud; (3) the jury should have been required to return a special verdict setting forth the overt acts it found in support of the conspiracy conviction; (4) the district court erred in sentencing Braswell under the United States Sentencing Guidelines without finding that an overt act was taken after the effective date of the Guidelines; and (5) the evidence of conspiracy or overt acts after the effective date of the Guidelines was insufficient to sustain the district court's decision to sentence under the Guidelines. The government asserts that the prosecutor's comments did not justify the dismissal of the two perjury counts. In light of our disposition of the case, we address with any particularity only two of the parties' contentions: the claim with respect to the prosecutrix's misconduct before the grand jury and whether the district court erred in not making a specific fact finding on whether an overt act had taken place after the effective date of the Sentencing Guidelines. The other assignments of error are without merit.

A

On the question of whether the district court's dismissal of Counts Eight and Fifteen can be sustained, the law is clear. In *United States v. Mechanik*, 475 U.S. 66 (1986), the Supreme Court reversed this circuit's decision to reverse that portion of a conviction which was tainted by the simultaneous presence and in-tandem testimony of two government witnesses before the grand jury. The Supreme Court

[4]Braswell makes this assertion in several subsections of his brief. We will consider his allegations in the aggregate. In addition, he argues that the entire indictment, including the misdemeanor tax charges to which he pleaded guilty, should have been dismissed. There is no evidence in the record that Braswell made a motion for judgment of acquittal with respect to the charges to which he pleaded guilty. We therefore do not address this contention and affirm his misdemeanor convictions.

assumed that the conduct in question violated Rule 6(d) of the Federal Rules of Criminal Procedure, but reasoned that the subsequent conviction by the petit jury rendered any error before the grand jury harmless. The Court relied, in part, on the societal costs of retrials when the error cannot be shown to be other than harmless. 475 U.S. at 72-73.

Following *Mechanik*, the Supreme Court decided *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), in which the Court held that a district court may not invoke its supervisory powers to avoid the harmless error analysis required under *Mechanik*. Absent a structural defect, see 487 U.S. at 257, which is not present here, a defendant who seeks to have a conviction vacated or an indictment dismissed because of misconduct before the grand jury must "'establish[ ] that the violation substantially influenced the grand jury's decision to indict' or [that] there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations." 487 U.S. at 256 (quoting *Mechanik*, 475 U.S. at 76 (O'Connor, J. concurring)). Braswell is not able to make the required showing that the error was not harmless. There is no allegation of systemic and pervasive prosecutorial misconduct here that might allow a presumption of prejudice, 487 U.S. at 259, and the petit jury's verdict is conclusive on the propriety of the grand jury's decision to indict, 475 U.S. at 70.[5] In sum, although the prosecutrix may have helped the grand jury indict Braswell, the record does not show that her conduct substantially influenced the decision of the grand jury or placed such influence in grave doubt. 487 U.S. at 263.

We base our decision on *Mechanik* and *Bank of Nova Scotia*. In *Bank of Nova Scotia*, the Court considered the following findings of the district court and held that the indictment should not have been dismissed:

> We are left to consider only the District Court's findings that the prosecutors: (1) fashioned and administered unauthorized "oaths" to IRS agents in violation of Rule 6(c); (2) caused the same IRS agents to "summarize" evidence falsely

[5]Our decision on the perjury convictions applies equally to the conspiracy conviction.

> and to assert incorrectly that all the evidence summarized by them had been presented previously to the grand jury; (3) deliberately berated and mistreated an expert witness for the defense in the presence of some grand jurors; (4) abused its authority by providing "pocket immunity" to 23 grand jury witnesses; and (5) permitted IRS agents to appear in tandem to present evidence to the grand jury in violation of Rule 6(d).

487 U.S. at 260.

The conduct of the prosecutrix here was lacking, but we cannot say that it was enough to justify legally the dismissal of the indictment in the face of the holding that the conduct of the prosecutors above described in *Bank of Nova Scotia* was not. Accordingly, the judgment of acquittal on Counts Eight and Fifteen must be reversed. It follows that the denial of the motion for judgment of acquittal on Count One must be affirmed since the defendant's appeal on that count on the same question rested on the same conduct.

We do not leave the subject, however, without stating our frustration. Every now and then a district judge is required to take an action which he is bound to know is borderline, but which must be taken or else he turns his courtroom over to the attorneys, in this case, the prosecutrix. This is such a case. The conduct of the prosecutrix before the grand jury in this case was without justification and the fact that we have not sustained the judgment of acquittal does not mean that we approve the conduct. Her seeming invitation to the grand jury to join the prosecution certainly is not worthy of approbation, and it certainly is no help to the office of the U. S. Attorney in which the conduct took place that this might well be an act which could be considered a part of a history of prosecutorial misconduct so as to raise a substantial and serious question about the fundamental fairness of the process which resulted in indictment in some future case. See *Bank of Nova Scotia*, 487 U.S. at 259.

Although our sympathies may be, and are, with the district judge in this case, we are required to and we do reverse the judgment of acquittal on Counts Eight and Fifteen.

III

At sentencing, the district court stated, over Braswell's objection, that because the indictment charged a time period for the conspiracy that extended past the effective date of the Guidelines, there was no need to find the existence of an overt act occurring past that date in order to sentence the defendant pursuant to the Guidelines. This is in conflict with our decisions. See, e.g., *United States v. Bakker*, 925 F.2d 728, 739 (4th Cir. 1991). Although it appears to us that there may well be enough evidence in the record to justify the finding of the existence of an overt act or acts after the effective date of the Guidelines, in light of our decision with respect to Counts Eight and Fifteen, the case must be remanded for resentencing and the sentences imposed on all counts of the indictment must be vacated. At sentencing, the district court will address any argument about overt acts past the effective date of the Guidelines as well as any other matter pertinent to that proceeding.

Accordingly, we vacate Braswell's sentences and the district court's grant of judgment of acquittal on Counts Eight and Fifteen, and remand for reinstatement of the convictions and resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE UNITED STATES
DISTRICT COURT FOR
THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH

No. 92-101-01-CR-5-BO

UNITED STATES OF AMERICA	)	
	)	
v.	)	ORDER
	)	
ROLAND C. BRASWELL,	)	
Defendant.	)	

The defendant was convicted by a jury of conspiracy to launder funds in connection with drug trafficking and two counts of perjury before the federal grand jury. The defendant is an attorney. The evidence at trial was that certain confessed drug dealers employed the defendant to handle business transactions for them. Their purpose was to convert drug proceeds into legitimate investments. The defendant was charged in 16 counts of an indictment. Eight of these counts arose out of alleged perjury before the grand jury during the defendant's testimony before that body. Six counts charged failure to file federal income tax returns. One count charged the conspiracy and, finally, the defendant was charged with aiding and abetting in the preparation of a false income tax return.

At trial the court dismissed six of the eight perjury counts as being duplicative of the same statement. The defendant was found not guilty by the jury on the charge of aiding and abetting in the preparation of a false income tax return. The defendant pled guilty to the six counts of

failure to file federal income tax returns. The defendant was found guilty by the jury of the conspiracy charge.

The defendant now moves for a judgment of acquittal on the three counts, Count 1, Count 8, and Count 15, on which he was convicted.

Discussion

The court denies the motion for judgment of acquittal on Count 1, the charge of conspiracy, but allows the judgment of acquittal on Counts 8 and 15, the two perjury convictions.

As a part of the government's investigation into the financial activities of Richard Riggs and James Canady, persons involved in drug trafficking activity, the prosecution investigated their financial transactions including the establishment of Coastal Innovations, Inc., a North Carolina corporation. The defendant Braswell was their attorney in connection with this business. The defendant was asked to produce the corporate minute book of Coastal Innovations, Inc. for the years 1985 through 1988. The defendant was counsel to this business and served as its Assistant Secretary. After obtaining the corporate minute book, the government performed chemical tests and other forensic examinations to determine the date of the manufacture of the paper used in portions of the book. It was scientifically determined that the paper was made after January, 1992. Certain entries in the minute book indicated that they had been made in May, 1985, almost seven years prior to the existence of the paper. The government concluded that the corporate records had been fabricated and produced in response to its investigation of suspected money

laundering through this corporation.

The government invited the defendant to testify before the grand jury. The defendant agreed and appeared during the grand jury consideration of this case. Just prior to the defendant's appearance on August 16, 1992, before the grand jury to give testimony regarding the corporate minute books, the grand jury heard from a special agent with the Internal Revenue Service who was the case agent handling the investigation. As the IRS agent's testimony ended, and prior to calling the defendant, the Assistant United States Attorney handling the case made the following statement to the grand jurors:

> Mr. Braswell -- we've invited him to appear in front of the Grand Jury. So right now he may be outside with his attorney, so I'd ask you not to make any comments about any of this because we anticipate that Mr. Braswell may perjure himself today in front of you, and I want him to -- us to have a very friendly atmosphere in here so that he feels very at ease in giving his explanations for this type of thing. And then we may -- we're going to have another witness come in later with some other information. Is there anything you want to say about that -- so I'd ask you to please not say a word, because I anticipate that they'd be out there right now. Thanks.

Following this statement, the defendant appeared and was questioned repeatedly regarding the entries in the corporate minute books and whether these were made in 1985 as indicated or were later fabricated in 1992 just

prior to producing the books. The defendant appeared to say that the entries were made at the time that they indicate, suggesting they were made in 1985, which could not be scientifically true. The defendant's responses were generally vague. He stated that his usual practice was to complete the minutes after a meeting or within a reasonable time of a meeting and that he did not recall making any minutes for the corporate book during 1991 or 1992.

Thereafter the grand jury returned the indictment charging him with perjury based on his testimony regarding the corporate records from 1985 through 1988.

The grand jury testimony by the special agent and the prosecutor's statements were produced as Jencks material after the agent's testimony at trial. It was only at that time that the defendant became aware of the prosecutor's statements before the grand jury and, thereafter, the defendant promptly made a motion to quash the indictment on the perjury counts and for judgment of acquittal based on the prejudicial statements of the Assistant United States Attorney before the grand jury.

The court deferred a ruling on this motion and submitted the case to the jury which returned guilty verdicts on the two perjury counts in question.

The court finds that under the circumstances of this case the prosecutor's statements to the grand jury were of such a prejudicial character that the indictments on the perjury charges should be dismissed and a judgment of acquittal should be entered on those charges. The statements by the prosecutor telling the grand jury that

they could expect the defendant, who was then only a witness, an either a subject or a target before the grand jury, to commit perjury when he later came before them, was an unnecessary and prejudicial suggestion to the grand jury which should not be allowed. In addition, the prosecutor's invitation to the grand jury to expect the defendant's perjury and therefore to make him feel comfortable and at ease thereby facilitating the perjury, invited the grand jury to become involved in the prosecution's activities and should not be allowed. A grand jury, just as a trial jury, should be neutral, impartial, and uncommitted to either side during the case. United States v. Williams, 112 S.Ct. 1735, 1742 (1992). It would be fundamentally unfair for grand jurors to become participants in the investigation or prosecution of a crime. In so doing they would lose their neutrality and would invite abuse. United States v. Mara, 410 U.S. 19, 29 (1973) (Douglas, J., dissenting).

With respect to the defendant's conviction of the charge of conspiracy, the court finds that there was ample evidence to support the jury's verdict and that charge should not be disturbed.

SO ORDERED this 4th day of August, 1993.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 7, 1995

No. 93-5770
CR-92-101

UNITED STATES OF AMERICA
Plaintiff-Appellant

v.

ROLAND C. BRASWELL
Defendant-Appellee

No. 93-5813
CR-92-101

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

ROLAND C. BRASWELL
Defendant-Appellant

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellee/cross appellant's petition for rehearing

and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

ADDENDUM OF STATUTES, RULES, REGULATIONS OR OTHER AUTHORITIES

AMENDMENT V, UNITED STATES CONSTITUTION

AMENDMENT 5

Criminal actions-Provisions concerning-Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

DOCKET NO. 92-101-01-CR-5-BO

UNITED STATES OF AMERICA Plaintiff	)	
v.	)	NOTICE
	)	OF
ROLAND CLIFTON BRASWELL Defendant	)	APPEAL

The name and address of the appellant is Roland C. Braswell P. O. Box 1357, Goldsboro, NC 27533.

The name and address of appellant's attorney is Roland C. Braswell, P.O. Box 1357, Goldsboro, NC 27533-1357, Phone - (919) 734-8002. Appellant will be appearing pro se.

OFFENSE CHARGED: (1) Conspiracy to defraud the United States - Title 18 USC Section 371 and (2) Did knowingly make false declaration under oath as set out in count Eight and count Fifteen of the Bill of Indictment - Title 18 USC 1623.

Defendant appeals from his conviction of perjury in Count Eight and count Fifteen which conviction was dismissed by the District Court, reinstated upon the government's appeal by the Fourth Circuit and remanded for sentencing which was done on April 10, 1995: For that the evidence was not sufficient to convict the defendant; the alleged perjury was not material and in its sentencing of the defendant, the District Court's application of the Federal Guidelines was erroneous.

Defendant appeals from the order entered April 10, 1995 wherein the Court held that conspiracy to defraud the United States count was a straddle conspiracy and sentencing would be under Federal guidelines and for that the District Court did not comply with the mandate of the decision of the United States Court of Appeals For the Fourth Circuit decided February 8, 1995.

Defendant appeals from the Order rendered against him and entered on April 10, 1995 wherein he was sentenced to imprisonment for a term of 27 months.

Defendant is presently at liberty under bond.

The above named defendant hereby appeals to the United States Court of Appeals For the Fourth Circuit from the above stated Order and Judgment and from each and every part thereof adverse to the appellant and the whole thereof does this defendant appeals.

This 19th day of April 1995.

Roland C. Braswell
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